Group Costs Orders and Funding Commissions

By

Prof. Vince Morabito
Department of Business Law and Taxation
Monash Business School
Monash University

January 2024
ACKNOWLEDGMENTS

This report was made possible by a research donation received from William Roberts Lawyers. The support and encouragement of Bill Petrovski, Ding Pan and Carlos Jaramillo are also gratefully acknowledged.

As has been the case with all the other empirical reports and articles of mine made possible thanks to external funding, the information, data and views contained in this report are mine, and are independent of, and not influenced by, the views or business objectives of donors/funders or of any other persons who rendered support.

Listed below are other persons who have supported this project by providing me with relevant documents, data, information and/or advice.

Federal Court of Australia

Supreme Court of Victoria
➢ Justice Lisa Nichols.

Supreme Court of New South Wales
➢ Justice James Stevenson and Janaya Cowley.

Solicitors
➢ Vicky Antzoulatos and Craig Allsopp (Shine Lawyers); Rebecca Gilsenan, Vavaa Mawuli, Steven Foale, Richard Ryan, Michael Donelly, Simon Gibbs and Kirsty Ozdemir (Maurice Blackburn); Emma Pelka-Caven, Nathan Rapport, Nicole Jagger and Rory Walsh (Slater and Gordon); Damian Scattini and Meagan Bertolatti (Quinn Emanuel Urquhart & Sullivan); Frances Dreyer (Johnson Winter Slattery); Jem Punthakey and Ashley Cutchie (Phi Finney McDonald); Andrew Paull and Mathew Chuk (Echo Law); Kathryn Emeny (Maddens Lawyers); David Burstyner (Adley Burstyner); Dan Creevey (Creevey Horrell Lawyers); and Rebecca Janciauskas (JGA Saddler).

Barristers
➢ Ben Slade, Dr Peter Cashman, Lachlan Armstrong KC; and Kristine Hanscombe KC.

Academics
➢ Professor Vicki Waye (UniSA); and Dr Estelle Wallingford and Associate Professor Michael Duffy (Monash Business School).

Lawyerly.com.au
➢ Cat Fredenburgh, Christine Caulfield, Cindy Cameronne and Sam Matthews.

PhD candidate
➢ Trang Tran.
PUBLICATIONS SINCE START OF EMPIRICAL RESEARCH

REFEREED ARTICLES IN SCHOLARLY JOURNALS


BOOK CHAPTERS


RESEARCH REPORTS


CHAPTER 1

GROUP COSTS ORDERS

I. ACCESS TO JUSTICE RATIONALE

(1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—

(a) that the legal costs payable to the practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and

(b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

(2) If a group costs order is made

(a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

The provision reproduced above is s 33ZDA, which was added to Part 4A of the Supreme Court Act 1986 (Vic), starting from 1 July 2020.1 The origin of this ground-breaking legislative amendment2 may be found in a recommendation made by the Victorian Law Reform Commission (“VLRC”) in a report, on class actions and litigation funding, that was completed in March 2018. The principal justification that was put forward by the VLRC, and accepted by the Labor Victorian Government, was to enhance the ability of the Victorian group proceeding/class action regime introduced by Part 4A to enhance access to justice for similarly-situated claimants.3 The best description of the philosophy underpinning both this crucial legislative development and Part 4A itself was provided by Nichols J of the Supreme Court of Victoria:

1 See s 2 of the Justice Legislation Miscellaneous Amendments Act 2020 (Vic).
2 As explained by John Dixon J, “[GCOs] are an exception to the general prohibition upon a law practice purporting to calculate legal costs by reference to the amount of any award or settlement or the value of any property that may be recovered. Contingency fees can be contrasted with conditional billing or NWNF agreements, when legal costs only become payable to the law practice if a successful outcome is achieved in the proceeding, and such costs may include additional fees such as uplift fees”: Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201, [12(g)].
3 Victorian Law Reform Commission, Access to Justice - Litigation Funding and Group Proceedings (Report; March 2018), [3.98]: “[t]he class action regime in Victoria has proved to be an effective means of providing access to justice but appears to be underutilised. On average, only five proceedings have been filed each year. The Commission considers that permitting lawyers to receive a contingency fee, subject to the conditions discussed above, is a measured and contained means of ensuring that the class action regime in Victoria is meeting the objectives for which it was established”.

Electronic copy available at: https://ssrn.com/abstract=4699815
The purpose of s 33ZDA may be broadly described in the terms expressed in the second reading of the Bill introducing the provision, namely, to enhance justice by reducing potential barriers to commencing class actions in the Supreme Court of Victoria. Section 33ZDA sits within Part 4A …, which permits and governs the conduct of group proceedings in this Court. The principal object of that Part is enhancing group members’ access to justice. 4

The main feature of this Group Costs Order (“GCO”) regime entails class representatives asking the court, during the course of the proceeding, to make a GCO which will specify the percentage of any settlement proceeds or award of damages, that may be secured on behalf of the class members/group members, to which the class representative’s solicitors will be _prima facie_ entitled. Once damages or settlement proceeds are actually secured, the court may, in its discretion, leave the GCO rate unaltered or instead increase it or decrease it. In exchange for this right to be remunerated on a percentage-basis, solicitors are responsible for the costs payable to the opponent, including security for costs order made against the class representative.

An important benefit, available from the operation of the GCO regime, becomes apparent from the simple summary furnished above: in the event of monetary compensation being secured in the Part 4A litigation, liability for the remuneration payable to the solicitors running the litigation is shared equally among all the class members who will receive a share of the compensation.

How the GCO regime is intended to eliminate or reduce the barriers faced by claimants wishing to file a class action as well as other benefits secured by this regime were explained by John Dixon J:

> enabling a law firm to charge contingency fees in [class action] proceedings, can promote access to justice by removing the disincentive to representative plaintiffs of disproportionate exposure to financial risk compared to the value of their own claim, to reduce costs to group members by having a single fee, and to provide transparency and simplicity. 5

What is also clear is why the GCO regime has been described, in judicial pronouncements handed down with respect to GCO applications, as “in effect a statutory common fund order for the benefit of the law practice”. 6 The common fund doctrine - enunciated by the Full Federal Court in October 2016 in _Money Max International Pty Ltd v QBE Insurance Group_ 7 and inspired by the doctrine originally developed by the United States Supreme Court - envisaged the making of a so-called Common Fund Order (“CFO”), in the early stages of the litigation, which specified the percentage of any damages or settlement proceeds secured on behalf of the class that should be paid to the litigation funder supporting the litigation. At this later stage, the court may, in its discretion, alter the rate specified in the first CFO, subsequently called the

---

4 Allen v G8 Education Ltd [2022] VSC 32, [23]. See also Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201, [84] (per John Dixon J); and Lay v Nuix Ltd [2022] VSC 479, [77] (per Nichols J).

5 Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201, [93] (per John Dixon J).

6 Maglio v Hino Motor Sales Australia Pty Ltd [2023] VSC 757, [97] (M Osborne J). See also Lay v Nuix Ltd [2022] VSC 479, [70] (per Nichols J). Later in 2024, the Full Federal Court will consider whether the federal legislative class action regime, as it currently stands, can authorise CFOs for the benefit of solicitors acting for lead plaintiffs: see R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Reserved Question) [2023] FCA 1499.

7 (2016) 245 FCR 191.
Commencement CFO. But the operation and ambit of this doctrine was severely restricted by the December 2019 decision of the High Court in *BMW Australia Ltd v Brewster*.⁸ A majority of the High Court held that Commencement CFOs are not supported by the Federal class action regime and its New South Wales counterpart.

**AIM OF THIS REPORT**

The principal purpose of this report is to provide extensive data on the actual operation of this GCO regime in its first three and a half years. This is the first and, to date, the only Australian regime that allows plaintiff solicitors to be remunerated on an American-style contingency fee basis, if the Court authorises such remuneration pursuant to a GCO order. In light of the access to justice philosophy underpinning this measure, particular emphasis will be placed on the data relevant to the impact of the GCO regime on this internationally-recognised policy goal of class action regimes.

This report also provides corresponding data with respect to the funding commissions payable to litigation funders that have been authorised by Australian courts, at the settlement approval stage, in class actions supported by these entities (“funded class actions”). This data will be compared with the data on GCO rates/percentages. It will also highlight whether these funding commissions have changed since the commencement of the GCO regime. In the final chapter, an up-dated list, of all the Australian class action settlements that have generated gross settlement sums equal to at least $50m, is provided.

Subject to the availability of funding, I plan to provide up-dated data on GCOs and funding commissions on a regular basis.

---


Electronic copy available at: https://ssrn.com/abstract=4699815
II. VOLUME OF VICTORIAN CLASS ACTION LITIGATION

Data with respect to the total number of Victorian class actions filed up to the end of 2023 that I was able to identify, is presented below pursuant to calendar years in Table 1 and financial years in Table 2.

TABLE 1 – VICTORIAN CLASS ACTIONS PER CALENDAR YEARS

<table>
<thead>
<tr>
<th>Annual Data from 2000 to 2011</th>
<th>Annual Data from 2012 to 2023</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000 = 4</td>
<td>2012 = 5</td>
</tr>
<tr>
<td>2001 = 4</td>
<td>2013 = 4</td>
</tr>
<tr>
<td>2002 = 2</td>
<td>2014 = 8</td>
</tr>
<tr>
<td>2003 = 7</td>
<td>2015 = 9</td>
</tr>
<tr>
<td>2004 = 1</td>
<td>2016 = 3</td>
</tr>
<tr>
<td>2005 = 4</td>
<td>2017 = 5</td>
</tr>
<tr>
<td>2006 = 0</td>
<td>2018 = 6</td>
</tr>
<tr>
<td>2007 = 0</td>
<td>2019 = 6</td>
</tr>
<tr>
<td>2008 = 2</td>
<td>2020 = 24 (18 filed after the GCO regime started)</td>
</tr>
<tr>
<td>2009 = 3</td>
<td>2021 = 10</td>
</tr>
<tr>
<td>2010 = 8</td>
<td>2022 = 14</td>
</tr>
<tr>
<td>2011 = 16</td>
<td>2023 = 23</td>
</tr>
<tr>
<td>Total number of class actions</td>
<td>168 class actions</td>
</tr>
</tbody>
</table>

TABLE 2 – VICTORIAN CLASS ACTIONS PER FINANCIAL YEARS (“FY”)

<table>
<thead>
<tr>
<th>Annual Data from 2000-2001 FY to 2011-2012 FY</th>
<th>Annual Data from 2012-2013 FY to 2023-2024 FY</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000-2001 = 3</td>
<td>2012-2013 = 4</td>
</tr>
<tr>
<td>2001-2002 = 2</td>
<td>2013-2014 = 4</td>
</tr>
<tr>
<td>2003-2004 = 3</td>
<td>2015-2016 = 3</td>
</tr>
<tr>
<td>2004-2005 = 1</td>
<td>2016-2017 = 3</td>
</tr>
<tr>
<td>2005-2006 = 3</td>
<td>2017-2018 = 7</td>
</tr>
<tr>
<td>2006-2007 = 0</td>
<td>2018-2019 = 4</td>
</tr>
<tr>
<td>2007-2008 = 0</td>
<td>2019-2020 = 10</td>
</tr>
<tr>
<td>2008-2009 = 3</td>
<td>2020-2021 = 21</td>
</tr>
<tr>
<td>2009-2010 = 6</td>
<td>2021-2022 = 12</td>
</tr>
<tr>
<td>2010-2011 = 4</td>
<td>2022-2023 = 20</td>
</tr>
<tr>
<td>2011-2012 = 18</td>
<td>2023-2024 (up to 31 December 2023) = 12</td>
</tr>
<tr>
<td>Total number of class actions</td>
<td>164 class actions</td>
</tr>
</tbody>
</table>

The data above reveals that, to my knowledge, a total of 168 Victorian class actions have been filed in the first 24 years of the operation of Part 4A. This regime was deemed to commence on 1 January 2000 and thus has been in operation for exactly 24 years. The GCO regime has accompanied the Part 4A regime for only 42 months, or 17.5%, of the “life” of Part 4A. But

---

*Four class actions were filed in the first half of 2000 and are therefore not included in this table.*

Electronic copy available at: https://ssrn.com/abstract=4699815
notwithstanding this limited period, the post-GCO period\textsuperscript{10} has seen the filing of almost four out of every ten Victorian class actions; with 65 or 38.6\% of all the Part 4A proceedings filed until the end of 2023. In the pre-GCO period\textsuperscript{11} there was a monthly filing average of 0.4 Victorian class actions whilst the monthly filing average for the post-CGO period is 1.5 Victorian class actions.

We also see, from Table 1, that the number of Part 4A proceedings filed in just the first six months of the GCO regime (second half of 2020) surpassed the number of class actions filed in any of the preceding (entire) calendar years. It should be noted, however, that in the first six months of the GCO regime there was also another event that had a direct impact on the class action landscape: the Morrison Government’s decision that litigation funders were now required to hold a financial services licence and to register funded class actions as managed investment schemes. Also significant is that the third entire calendar year (in the post-GCO era) marked only the second time that 20 or more Victorian class actions were filed in a given calendar year. Conversely, this threshold of 20 class actions in a calendar year has never been reached by the New South Wales regime.

Similar trends appear from the data presented in Table 2, in relation to financial years. We see, for instance, that the average number of Victorian class actions per FY, up to and including the 2019-2020 FY, was 4.9 class actions. Conversely, 17.6 is the average number of Part 4A cases (per FY) in the GCO era.

The VLRC was of the view that the increased use of the Part 4A regime, that would be secured through the availability of contingency fee remuneration, would arise from the fact that such remuneration arrangements would render appealing for plaintiff solicitors potential class actions (a) that do not match the funding models employed by funders and (b) that are not feasible pursuant to the no win - no fee arrangements that have usually been employed by solicitors when the support of commercial litigation funders was not available.

In determining the true extent to which access to justice has been enhanced since the introduction of the GCO regime, it is important to ascertain whether, as a result of the frequent phenomenon in Australia of competing class actions\textsuperscript{12} - class actions filed by different solicitors with respect to essentially the same legal dispute\textsuperscript{13} - the number of post-GCO proceedings significantly overstates the number of separate legal disputes that provoked the filing of Part 4A litigation.

In the pre-GCO period, I found a total of 18 competing Part 4A proceedings which concerned a total of 12 legal disputes. This represents 17.4\% of all the pre-GCO Victorian class actions. The post-GCO competing Victorian class actions that I discovered have been highlighted in bold in the list of post-GCO Victorian class actions provided in Part III below. There were 29

\textsuperscript{10} This is the period commencing on 1 July 2020 (the day when the GCO regime came into operation) and ending on 31 December 2023.

\textsuperscript{11} This is the period starting on 1 January 2000 - the day when the Part 4A was deemed to come into operation - and ending on 30 June 2020 (the day before the commencement of the GCO regime).

\textsuperscript{12} The problem of competing class actions is far more severe in the United States and Canada: see V Morabito, “Clashing Classes Down Under - Evaluating Australia’s Competing Class Actions through Empirical and Comparative Perspectives” (2012) 27 Connecticut Journal of International Law 245, 313.

\textsuperscript{13} See ibid 253-257 for a complete definition of the concept of competing class actions used for this report.
class actions that matched this description;\(^{14}\) 44.6% of all the post-GCO Part 4A cases. They were brought with respect to a total of 12 legal disputes. This means that the 65 post-GCO class actions arose from a total of 48 legal disputes. This latter figure provides a more accurate measure of the extent to which access to justice has been achieved in the post-GCO period. But it still represents a significant improvement when compared with the pre-GCO period. It is also useful to compare the categories of Victorian class actions filed in the pre-GCO period with the types of proceedings filed in the post-GCO period.

**CATEGORIES OF CLASS ACTIONS FILED IN THE PRE-GCO PERIOD**

1. Mass tort = 33 (32%)
2. Investor = 27 (26%)
3. Shareholder = 15 (14.5%)
4. Product liability = 11 (10.6%)
5. Consumer protection = 6 (5.8%)
6. Real estate-related claims = 4 (3.8%)
7. Claims by persons wishing to remain in Australia = 2 (1.9%)
8. Borrowers &/or guarantors claims = 1 (0.9%)
9. Claims by franchisees, agents &/or distributors = 1 (0.9%); and
10. Others = 1 (0.9%).

**Total = 103 class actions**

**CATEGORIES OF CLASS ACTIONS FILED IN THE POST-GCO PERIOD**

1. Shareholder = 30 (46.8%)
2. Consumer protection = 11 (16.9%)
3. Product liability = 8 (12.5%)
4. COVID-related claims = 6 (9.3%)
5. Mass tort = 5 (7.8%)
6. Claims by franchisees, agents &/or distributors = 3 (4.6%)
7. Racial discrimination = 1 (1.5%); and
8. Others = 1 (1.5%)

**Total = 65 class actions**

Comparing these two lists highlights a number of interesting changes, including the significant decrease in the number and proportion of mass tort,\(^{15}\) the “disappearance” of investor\(^{16}\) class actions and the increase in the importance of consumer protection and product liability class actions. But the most striking feature of the data revealed by the second list is that in the current GCO era shareholder class actions dominate in Victoria. Whether or not these developments are desirable largely depends on one’s subjective views. What can be stated is that this far greater importance of shareholder litigation does not appear to have been among the objectives that the GCO regime was intended to secure, given that shareholder class actions have always

\(^{14}\) Six of these competing class actions were commenced in the Federal Court and were subsequently transferred to the Supreme Court of Victoria. These six class actions concerned three different legal disputes.

\(^{15}\) This category was dominated by Part 4A cases filed on behalf of the victims of bushfires.

\(^{16}\) This category included 16 class actions filed by the same firm on behalf of persons who invested in the Great Southern Scheme (one in 2010 and 15 in 2011).
been one of the categories of class actions preferred by litigation funders; the most important players in Australia’s class action landscape over the last 21 years or so.

A number of post-GCO Part 4A cases have been filed on behalf of vulnerable or disadvantaged class members like residents in aged care facilities;\textsuperscript{17} alleged victims of childhood sexual abuse;\textsuperscript{18} Aboriginal and Torres Strait Islander people who claim to have been racially abused and vilified when they were football players;\textsuperscript{19} and 3,000 residents across nine public housing towers who were detained in their own homes for up to 14 days as a result of the Victorian Government’s COVID-19 response lockdown.\textsuperscript{20} But, to my knowledge, in none of these Part 4A cases have the class representatives applied for a GCO.

The list of post-June 2020 Part 4A cases provided in Part III below reveals a variety of defendants. These defendants have included the State of Victoria, car manufacturers, a major health insurer, car manufacturers, the Australian Football League, banks, mining companies, insurance companies, superannuation companies, casino operators, law firms, Uber, pharmaceutical companies, a multinational technology company, an oilseed manufacturer, food manufacturers, a fertility clinic, cosmetic surgeons, a security company, a home entertainment retailer, a payments processing company and an incorporated charitable association dedicated to, among other things, the promotion of a particular religion.

\textsuperscript{17} Class actions no. 4 and 5 in Part III below.  
\textsuperscript{18} Class action no. 62.  
\textsuperscript{19} Class action no. 59.  
\textsuperscript{20} Class action no. 20.
III. POST-GCO VICTORIAN CLASS ACTIONS

1. S ECI 2020 02853 Fuller v Allianz Australia Insurance Ltd
2. S ECI 2020 02946 Fox v Westpac Banking Corporation
3. S ECI 2020 03281 Bogan v The Estate of Peter John Smedley (Deceased)
4. S ECI 2020 03282 Aghnello v Heritage Care Pty Ltd
5. S ECI 2020 03339 Fotiadis v St Basil’s Homes for the Aged in Victoria
6. S ECI 2020 03351 Hillman v Mayne Pharma Group Ltd
7. S ECI 2020 03356 O’Brien v ANZ
8. S ECI 2020 03402 5 Boroughs NY Pty Ltd v State of Victoria
9. S ECI 2020 03593 Stewart v Uber Technologies Incorporated
10. S ECI 2020 03598 Roberts v State of Victoria
11. S ECI 2020 03679 Markovic v Unified Security Group (Australia) Pty Ltd
12. S ECI 2020 03924 Nathan v Macquarie Leasing Pty Ltd
13. S ECI 2020 04230 Wilkinson v Allianz Australia Insurance Ltd
14. S ECI 2020 04339 Allen v G8 Education Limited
17. S ECI 2020 04761 Bopping v Monash IVF Pty Ltd
18. S ECI 2020 04789 Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd
20. S ECI 2021 00826 Hassan v State of Victoria
21. S ECI 2021 00930 Anderson-Vaughan v AAI Ltd
22. S ECI 2021 03645 Thomas v The A2 Milk Company Ltd
23. S ECI 2021 03706 Youseff v Australian Pharmaceutical Industries Ltd
24. S ECI 2021 04360 Lay v Nuix Limited
25. S ECI 2021 04391 Batchelor v Nuix Limited
26. S ECI 2021 04403 Xiao v The A2 Milk Company Ltd
27. S ECI 2021 04440 Nelson v Beach Energy Ltd
28. S ECI 2021 04738 Mumford v EML Payments Ltd
29. S ECI 2022 00256 Sanders v Beach Energy Ltd
30. S ECI 2022 00515 Bassi v Sri Guru Sabha
31. S ECI 2022 00735 Bahtiyar v Nuix Limited
32. S ECI 2022 00739 Lombardo v Dermatology & Cosmetic Surgery Services Pty Ltd
33. S ECI 2022 01039 DA Lynch Pty Ltd v The Star Entertainment Group
34. S ECI 2022 02887 Norris v Insurance Australia Group Ltd
35. S ECI 2022 03433 Fuller v Fletcher Building Ltd
36. S ECI 2022 03440 Brown v State of Victoria
37. S ECI 2022 03869 Maglio v Hino Motor Sales Australia Pty Ltd
38. S ECI 2022 00313 Rowe v Toyota Motor Corporation Australia Ltd
39. S ECI 2022 0492 Drake v The Star Entertainment Group
40. S ECI 2022 04261 FNH United Pty Ltd v United Petroleum Franchise Pty Ltd
41. S ECI 2022 04768 Wawryk v Mercedes-Benz Australia/Pacific Pty Ltd
42. S ECI 2022 05424 Johnston v Hyundai Motor Company Australia Pty Ltd
43. S ECI 2023 00413 Jowene Pty Ltd v The Star Entertainment Group
44. S ECI 2023 00428 Huang v The Star Entertainment Group
45. S ECI 2023 00959 Moroney v Kia Australia Pty Ltd
46. S ECI 2023 00969 Rooke v Australian Football League
47. S ECI 2023 01055 Tuck v Australian Football League
48. S ECI 2023 01227 Kilah v Medibank Private Limited
49. S ECI 2023 01521 McCoy v Hino Motors Ltd
50. S ECI 2023 01835 Lidgett v Downer EDI Ltd
51. S ECI 2023 01899 Raeken Pty Ltd v James Hardie Industries PLC
52. S ECI 2023 02581 Jenner v Toyota Finance Australia Ltd
53. S ECI 2023 02833 Sinnamon v Medibank Private Limited
54. S ECI 2021 04524 Green v Graincorp Oilseeds Pty Ltd
55. S ECI 2023 03566 Warner v Ansell Limited
56. S ECI 2023 03645 Kajula Pty Ltd v Downer EDI Ltd
57. S ECI 2023 03646 Jowene Pty Ltd v Downer EDI Ltd
58. S ECI 2023 03647 Teoh v Downer EDI Ltd
59. S ECI 2023 04323 Krakouer v Australian Football League
60. S ECI 2023 04365 Edwards v Hyundai Motor Company Australia Pty Ltd
61. S ECI 2023 04370 Sims v Kia Australia Pty Ltd
62. S ECI 2023 04435 Jane Jones (a Pseudonym) v Waller Legal Pty Ltd
63. S ECI 2023 05208 Gawler v FleetPartners Group Limited
64. S ECI 2023 05830 Clarke v JB Hi-Fi Group Pty Ltd
65. S ECI 2023 06090 Gleeson v Apple Inc

---

21 This proceeding, filed as an orthodox proceeding in 2021, is treated as a 2023 class action as it was converted into a Part 4A proceeding in 2023.
IV. DATA ON GCOs

TABLE 3: GROUP COSTS ORDERS AS AT 31 DECEMBER 2023

<table>
<thead>
<tr>
<th>CLASS ACTION; DATE OF GCO; JUDGMENT CITATION</th>
<th>NAME OF JUDGE; PLAINTIFF LAW FIRM(S)</th>
<th>TYPE OF SUBSTANTIVE CLAIM; WERE THERE COMPETING CLASS ACTIONS? WAS THE GCO MADE IN THE CONTEXT OF A CARRIAGE MOTION? IS A LITIGATION FUNDER INVOLVED?</th>
<th>GCO PERCENTAGE(S) ORDERED; HAS THE LITIGATION COME TO A SUCCESSFUL CONCLUSION?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. S ECI 2020/04339 Allen v G8 Education Ltd 7 February 2022 [2022] VSC 32</td>
<td>Nichols J Slater &amp; Gordon</td>
<td>Shareholder No competing class actions No funder involved</td>
<td>27.5% Still in progress</td>
</tr>
<tr>
<td>2. S ECI 2020/03281 Bogan v The Estate of Peter John Smedley (Deceased) 26 April 2022 [2022] VSC 201</td>
<td>John Dixon J Banton Group</td>
<td>Shareholder No competing class actions Funder involved</td>
<td>40% Still in progress</td>
</tr>
<tr>
<td>3. S ECI 2021/04440 Nelson v Beach Energy Ltd 1 August 2022 [2022] VSC 424</td>
<td>Nichols J Slater &amp; Gordon Shine Lawyers</td>
<td>Shareholder Two competing class actions GCO made as part of a carriage motion No funder involved</td>
<td>24.5% Still in progress</td>
</tr>
<tr>
<td>4. S ECI 2020/04505 Gehlke v Noumi Ltd (formerly Freedom Foods Group Ltd) 8 November 2022 [2022] VSC 672</td>
<td>Nichols J Slater &amp; Gordon Phi Finney McDonald</td>
<td>Shareholder Two competing class actions GCO not made as part of a carriage motion Funder involved</td>
<td>22% Still in progress</td>
</tr>
</tbody>
</table>

Electronic copy available at: https://ssrn.com/abstract=4699815
<table>
<thead>
<tr>
<th></th>
<th>S ECI 2021/04738</th>
<th>Delany J</th>
<th>Shareholder</th>
<th>No competing class actions</th>
<th>24.5%&lt;sup&gt;22&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mumford v EML Payments Ltd</td>
<td>Shine Lawyers</td>
<td>No funder involved</td>
<td>24.5%&lt;sup&gt;22&lt;/sup&gt; Still in progress</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6 December 2022 [2022] VSC 750</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>6. S ECI 2020/02853</td>
<td>Nichols J</td>
<td>Consumer protection</td>
<td>Two competing class actions</td>
<td>25% Still in progress</td>
</tr>
<tr>
<td></td>
<td>Fuller v Allianz Australia Insurance Limited</td>
<td>Maurice Blackburn</td>
<td>GCO not made as part of a carriage motion</td>
<td>Funder involved</td>
<td></td>
</tr>
<tr>
<td></td>
<td>13 December 2022</td>
<td>Johnson Winter &amp; Slattery</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>No publicly-available judgment&lt;sup&gt;23&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>7. S ECI 2020/04566</td>
<td>Stynes J</td>
<td>Shareholder</td>
<td>No competing class actions</td>
<td>27.5% for each dollar of award or settlement sum that is recovered between $0 and $100m; 22% for each dollar of award or settlement sum that is recovered between $100,000,001 and $150m: and 16.5% for each dollar of award or settlement sum that is over $150m.</td>
</tr>
<tr>
<td></td>
<td>Lieberman v Crown Resorts Limited</td>
<td>Maurice Blackburn</td>
<td>No funder involved</td>
<td></td>
<td>Still in progress</td>
</tr>
<tr>
<td></td>
<td>16 December 2022 [2022] VSC 787</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8. S ECI 2020/02946</td>
<td>Nichols J</td>
<td>Consumer protection</td>
<td>No competing class actions</td>
<td>24.5%&lt;sup&gt;24&lt;/sup&gt; Still in progress</td>
</tr>
<tr>
<td></td>
<td>Fox v Westpac Banking Corporation</td>
<td>Maurice Blackburn</td>
<td>Funder involved</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3 March 2023</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<sup>22</sup> Justice Delany refused the application for a GCO rate of 30% and instead authorised a rate of 24.5%: *Mumford v EML Payments Limited* [2022] VSC 750, [7].

<sup>23</sup> See, however, *Fuller v Allianz* [2021] VSC 581.

<sup>24</sup> This GCO was issued on the second application filed by the class representatives. The first application, which sought a GCO rate of 25%, was rejected by Nichols J: *Fox v Westpac* [2021] VSC 573.
<table>
<thead>
<tr>
<th></th>
<th>Case Reference</th>
<th>Courtroom</th>
<th>Litigants</th>
<th>Nature of Action</th>
<th>Proposed GCO</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.</td>
<td>S ECI 2020/03924 Nathan v Macquarie Leasing Pty Ltd</td>
<td>[2023] VSC 95</td>
<td>Nichols J Maurice Blackburn</td>
<td>Consumer protection, No competing class actions, Funder involved</td>
<td>24.5%</td>
<td>Still in progress</td>
</tr>
<tr>
<td>12.</td>
<td>S ECI 2022/01039 DA Lynch v Star Entertainment Group</td>
<td>[2023] VSC 561</td>
<td>Nichols J Slater &amp; Gordon</td>
<td>Shareholder, Four competing class actions, GCO made as part of a carriage motion, No funder involved</td>
<td>14%</td>
<td>Still in progress</td>
</tr>
<tr>
<td>13.</td>
<td>S ECI 2023/01835 Lidgett v Downer EDI Ltd</td>
<td>[2023] VSC 574</td>
<td>Delany J Maurice Blackburn, with William Roberts Lawyers acting as agents for Maurice Blackburn</td>
<td>Shareholder, Four competing class actions, GCO made as part of a carriage motion, No funder involved</td>
<td>21%</td>
<td>Still in progress</td>
</tr>
<tr>
<td>14.</td>
<td>S ECI 2020/03402</td>
<td></td>
<td>Keogh J</td>
<td>COVID-related, No competing class actions, Funder involved</td>
<td>30%</td>
<td>Still in progress</td>
</tr>
</tbody>
</table>

25 This GCO was issued on the second application filed by the class representatives. The first application, which sought a GCO rate of 25%, was rejected by Nichols J: Fox v Westpac [2021] VSC 573.
<table>
<thead>
<tr>
<th>Case</th>
<th>Firms and Details</th>
<th>Outcome and Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>15. S ECI 2023/01521 <strong>McCoy v Hino Motors Ltd</strong> 15 December 2023 [2023] VSC 757</td>
<td>M Osborne J Maurice Blackburn Product liability Two competing class actions GCO made as part of a carriage motion Funder involved</td>
<td>Up to $75m: 25%; between $75,000,001 and $150m: 22.5%; between $150,000,001 and $255m: 20%; and over $225m: 17.5%. Still in progress</td>
</tr>
<tr>
<td>16. S ECI 2021/03645 <strong>Thomas &amp; Xiao v The A2 Milk Company Ltd</strong> 19 December 2023 [2023] VSC 768</td>
<td>M Osborne J Slater &amp; Gordon Shine Lawyers Shareholder Two competing class actions GCO not made as part of a carriage motion No funder involved</td>
<td>24% Still in progress</td>
</tr>
</tbody>
</table>

The data presented above reveals the issue of GCOs, up to the end of 2023, by a total of six judges in favour of a total of eight law firms. But it is fascinating to note that - as a result of competing class actions - there were originally 27 Part 4A cases (40% of all the post-GCO class actions I identified) which were subsequently reduced to the 16 class actions in which these GCOs were made. This reduction occurred because of consolidation and permanent stay orders issued to deal with the problem of competing class actions. It should also be added that in one of the three Victorian competing class actions filed against Nuix Limited - S ECI 2022 00735 **Bahtiyar v Nuix Limited** - a GCO application was rejected by the court in the context of a carriage motion where this proceeding was permanently stayed.26

The fact that in half of these 16 class actions some financial support was provided by litigation funders is of great relevance to law-makers in other class action jurisdictions in light of the fact that in 2018 the Australian Law Reform Commission recommended that the following prohibition apply to the contingency fee regime that it recommended for federal class actions:

an action that is funded through a percentage-based fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis.27

No similar restriction was recommended by the VLRC and, as a result, s 33ZDA does not restrict so-called hybrid funding arrangements with litigation funders or similar funding entities.

---


In light of the dominance of shareholder class actions in Victoria’s GCO era, it is not surprising to see that nine out of these 16 GCOs were made in this category of class actions. The consumer protection claims category was the only other category of class actions that “received” more than one GCO, with a total of 5 GCOs. In two of these 16 GCOs, a “ratchet”\(^{28}\) or sliding scale mechanism was authorised pursuant to which the percentage, by which costs were to be calculated, decreases as the recovery sum increases. With respect to these two GCOs, median percentages were employed in compiling the statistics set out below.\(^{29}\)

The practical operation of this mechanism may be illustrated with a simple example. If the Hino Motors class action (no. 15 above) is settled for $100m, the entitlement of the lead plaintiff’s solicitors pursuant to the GCO (if confirmed by the Court at the settlement stage) would be calculated as follows. The GCO rate of 25% would apply to the first $75m, providing the sum of $18.75m. The lower GCO rate of 22.5% would then be applied to the remaining $25m, providing the sum of $5,625,000. The total payment to the solicitors would be equal to $24,375,000 ($18.75m + $5,625,000); providing an effective GCO rate equal to 24.3%.\(^{30}\)

**GENERAL DATA ON GCOs**

- Range of GCO rates = 14% - 40%.
- **Median GCO rate = 24.5%**.
- Range of GCO rates in 2022 = 22% - 40%.
- **Median GCO rate in 2022 = 24.5%**.
- Range of GCO rates in 2023 = 14% - 30%.
- **Median GCO rate in 2023 = 24.5%**.
- **Most common GCO rate = 24.5%** (5 GCOs: 31%).
- GCO rates equal to 40% or more = 1 GCO (6.2%).
- GCO rates between 30% and 34.99% = 1 GCO (6.2%).
- GCO rates between 25% and 29.99% = 3 GCOs (18.7%).
- GCO rates between 20% and 24.99% = 10 GCOs (62.5%).
- GCO rates between 15% and 19.99% = 0 GCO (0%).
- GCO rates between 10% and 14.99% = 1 GCO (6.2%).
- Range of GCO rates in shareholder class actions = 14% - 40%.
- **Median GCO rate in shareholder class actions = 24%**.
- Range of GCO rates in consumer protection class actions = 24.5% - 25%.
- **Median GCO rate in consumer protection class actions = 24.5%**.
- Range of GCO rates in class actions supported by funders = 21.2% - 40%.
- **Median GCO rate in class actions supported by funders = 24.5%**.

In order to fully understand the practical significance of the statistics presented above it is important to understand that the sum payable to the class representative’s solicitor, pursuant to the percentage prescribed in the GCO, is the only deduction that will be made from the damages or settlement proceeds procured in the litigation. Thus, where the GCO rate is equal to 24.5%, unless that rate is subsequently altered by the court, the class members will receive 75.5% of the monetary compensation in question. I return to this issue in the final part of this chapter.

---

\(^{28}\) *Nelson v Beach Energy* [2022] VSC 424, [86] (per Nichols J) (“ratcheting the percentage as the recovered amount increases”).

\(^{29}\) 22% for GCO no. 7 and 21.2% for GCO no. 15.

\(^{30}\) The mechanism authorised by GCO no. 7 works in the same way but uses slightly different figures.
COMPARISON WITH FUNDING COMMISSIONS IN FUNDED CLASS ACTIONS

Corresponding statistics - with respect to judicially-approved funding commissions at the settlement stage of funded class actions - are provided in Chapter 2 below. The median funding commission - with respect to the period from the landmark decision of the Full Federal Court in *Money Max* to the end of 2023 - of 24% is almost identical to the median GCO rate whilst the median funding commission for the post-GCO period is even lower: 22.7%.

It is reasonable to conclude that the reduction in the median funding commission - from 24.9% in the pre-GCO period to 22.7% in the post-GCO period - also revealed in Chapter 2 may be attributable (at least to some extent) to the availability of GCOs in Victorian class actions.

RELEVANCE OF COMPETING CLASS ACTIONS

Data is also presented below in relation to three scenarios defined by reference to the presence or lack of competing class actions and, with respect to the former state of affairs, the interaction between GCO applications and so-called carriage motions. The latter term is used to describe the procedure employed to determine how the existence of competing class actions should be dealt with. The three scenarios in question are described below:

(a) where there were no competing class actions;

(b) where there were competing class actions among the original class actions filed but this problem was resolved before the court was required to evaluate an application for a GCO; and

(c) where the GCO application was considered as part of a carriage motion held to address the multiplicity of class actions problem.

1. NO COMPETING CLASS ACTIONS

- 9 (56.2%) GCOs.
- Range of GCO rates = 22% - 40%.
- Median GCO rate = 24.5%.

2. COMPETING CLASS ACTIONS BUT GCO APPLICATION NOT PART OF A CARRIAGE MOTION

- 3 (18.7%) GCOs.
- Range of CGO rates = 22% - 24%.
- Median GCO rate = 24%.

3. CGO APPLICATION CONSIDERED AS PART OF A CARRIAGE MOTION

- 4 (25%) GCOs.
- Range of CGO rates = 14% - 24.5%.
- Median GCO rate = 21.2%.

The statistics provided above are consistent, to some extent, with what one would expect. When one is asking for a GCO and is not, at the same time, asking the court to select one’s proceeding
over the proceedings filed by others, there are no rational incentives to ask for the lowest possible GCO rate. Not surprisingly, the highest median GCO rate is for this category of GCOs.

The diametrically opposed scenario is where - as a result of competing class actions - the desire to continue being involved in the litigation takes precedence over the natural desire to secure the highest possible GCO rate.\(^{31}\) It will be recalled that the lowest GCO rate to date, 14%, was secured in this context. The downward effect of carriage motions on GCO rates was summarised as follows by M Osborne J (in the context of the competing class actions against Hino Motors):

as a result of the competitive processes associated with the carriage applications, the proposed [GCO] rate has been revised in a manner which is more beneficial to class members. The proposed rate therefore has been the product of a quasi-tender process given the carriage application. This process gives comfort as to the lowest market price available to fund the proceedings [emphasis added].\(^{32}\)

His Honour went on to explain how this quasi-tender process has operated:

[The orders contemplated in the first instance a blind tender so as to obtain the best funding terms for group members. As Delany J described in Lidgett v Downer EDI Ltd, such a process is “designed to encourage each party to put forward their best proposal, the proposal that would best advance the interests of group members”.

The orders further contemplated that after seeing the “tender” proffered by the other each plaintiff party would then have the ability to submit a further tender in response. The process therefore includes a competitive element with the possibility that one or the other could submit a second proposal more advantageous to group members.\(^{33}\)

As shown by the data above, Category 2 produced a median GCO rate almost identical to the median rate for GCOs issued in Category 1; the category of non-competing class actions. This similarity surprised me as I had assumed that the solicitors applying for a GCO (via the class representatives),\(^{34}\) who have managed to remain as the solicitors on the record (together with other firms due to a consolidation of the competing proceedings),\(^{35}\) may have been conscious of the need not to lose the support of the court by asking for a GCO rate that might be judicially-perceived as excessive or unreasonable. The median rate suggests instead that once the competing class actions obstacle is overcome, it does not affect future decisions, including the GCO rate to be requested.\(^{36}\) But in light of the small number of GCOs in question, it is unwise to reach any definitive conclusions.

\(^{31}\) See also Ghee v BT Funds Management Limited [2023] FCA 1553, [135] (per Murphy J).

\(^{32}\) Maglio v Hino Motor Sales Australia Pty Ltd [2023] VSC 757, [109].

\(^{33}\) Ibid, [62]-[63]. See also Lidgett v Downer EDI Ltd [2023] VSC 574, [33]-[35] (per Delany J).

\(^{34}\) It will be recalled that pursuant to the terms of s 33ZDA the GCO application must be filed by the class representative.

\(^{35}\) This is the order made in each of the Part 4A cases included in this category.

\(^{36}\) This data perhaps confirms the validity of the concern expressed by Allianz Insurance, the entity on the receiving end of two competing class actions which were subsequently consolidated (GCO no. 6 in Table 3 above), that the GCO applications by the competing plaintiffs/solicitors should have been considered in the context of a carriage motion, as it would have resulted in a lower GCO rate due to the “real substantial possibility” of the competing


RECIPIENTS OF GCOs

- Maurice Blackburn = 8 GCOs with a median rate of 24.5%.
- Slater & Gordon = 5 GCOs with a median rate of 24%.
- Shine Lawyers = 3 GCOs with a median rate of 24.5%.
- William Roberts Lawyers = 1 GCO (as the agent of Maurice Blackburn) with a rate of 21%.
- Phi Finney McDonald = 1 GCO with a rate of 22%.
- Johnson Winter & Slattery = 1 GCO with a rate of 25%.
- Quinn Emanuel Urquhart & Sullivan = 1 GCO with a rate of 30%.
- Banton Group = 1 GCO with a rate of 40%.

All of the eight law firms listed above (or their most senior solicitors, in the case of the recently formed law firms) can be said to have extensive expertise and experience in the class action arena. Indeed, they constitute most of the class action protagonists, on the plaintiff side.

PLAINTIFF SOLICITORS IN THE POST-GCO ERA

As the list below reveals, a total of 24 law firms have been solicitors on the record in at least one Part 4A proceeding filed after the introduction of the GCO regime. Only five law firms (highlighted in bold below) have also filed Part 4A cases before the introduction of the GCO regime. This means that almost 80% of the law firms that represented lead plaintiffs in the post-GCO stage had no involvement in Victorian class actions before the introduction of such a regime.37 Surprisingly, Maurice Blackburn, the leader in the post-GCO era, filed only four Part 4A cases in the three and a half years preceding the start of the GCO regime.

- **Maurice Blackburn** = 13 class actions.
- Phi Finney McDonald = 7 class actions.
- **Slater & Gordon** = 6 class actions.
- Shine Lawyers = 5 class actions.
- **Quinn Emanuel Urquhart & Sullivan** = 4 class actions.
- Banton Group = 3 class actions.
- **Carbone Lawyers** = 3 class actions.
- Margalit Injury Lawyers = 3 class actions.
- **Maddens Lawyers** = 2 class actions.
- Echo Law = 2 class actions.
- Levitt Robinson Solicitors = 2 class actions.
- Bannister Law = 2 class actions.
- Gerard Malouf & Partners = 2 class actions.
- William Roberts Lawyers = 1 class action.
- Johnson Winter & Slattery = 1 class action.
- Arnold Thomas & Becker Lawyers = 1 class action.

---

37 It should be noted, however, that a handful of these firms were formed either after or shortly before the introduction of the GCO regime. See, for instance, Banton Group and Echo Law.
➢ Piper Alderman = 1 class action.
➢ HWL Ebsworth = 1 class action.
➢ Clemens Haskin Legal = 1 class action.
➢ Mayweathers = 1 class action.
➢ Griffins Lawyers = 1 class action.
➢ DST Legal = 1 class action.
➢ Saundh, Singh and Smith Lawyers = 1 class action.
➢ Advocate Me = 1 class action.

GENERAL OBSERVATIONS

Whilst increasing the number of claimants who gain access to the courts - letting them “have their day in court” (via the lead plaintiffs), as is commonly said in the United States - is an important dimension of access to justice, in its most concrete manifestation access to justice is about ensuring that class members receive the legal redress to which they are entitled: almost invariably monetary compensation. The extent to which this desirable state of affairs is attained, depends when for instance class action litigation is settled, on the gross settlement sum secured and what is left to be distributed to class members after a number of deductions are made.

With respect to this latter issue, the GCO regime provides a vastly superior outcome for class members. As the data provided in this report shows, to date the median GCO rate has been only slightly higher than the median funding commission received by commercial litigation funders pursuant to settlements in Australian funded class actions judicially-approved during the post-GCO era; and the GCO rate is almost identical to the median funding commission for the longer post-Money Max period. But, as already noted, the most crucial fact is that the GCO rate constitutes the only deduction from the gross settlement sum - before a distribution of the settlement proceeds is made to class members - whilst in funded class actions the funding commission is only one of the deductions to be made, although it is usually the biggest deduction. Further deductions include legal costs, settlement administration costs and, on some occasions, After-the-Event Insurance.38

As a result, the judgments handed down by judges of the Supreme Court of Victoria, to explain the reasons for issuing GCOs, reveal a universal judicial acceptance of the fact that the GCOs would provide a far better financial return for class members than what would be received by them in funded class actions. Equally significant is the fact that all but two of the 16 GCOs that have been released to date, if confirmed at the settlement or damages award stage, will guarantee for class members a higher proportion of the gross settlement sums or awarded damages than the minimum 70% that the former Morrison Government sought to secure for them in successful class actions, in a Bill it introduced in the Commonwealth Parliament in 2021;39 and in one of the two remaining GCOs the proportion of the proceeds left for distribution to class members will be 70%. Another significant difference between these two

39 Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, cl 7, adding Corporations Act 2001 (Cth), s 601LG.
regimes is that the Victorian regime has secured this positive outcome by conferring more power on trial judges whilst the proposed Federal regime sought greater returns for class members by restricting the discretion that is currently available to trial judges.

At the time of writing this report, there are a number of important questions which cannot be answered. For instance, will the GCO regime provide plaintiff solicitors with a financial incentive to “raise the white flag” when they realise that the costs that they have already incurred will equal or exceed their share of any monetary compensation they are likely to secure for class members? Will they refrain from taking all steps required to achieve the best possible result because that strategy would erode most of their profits, if the GCO rate they secured (eg in a carriage motion) was quite low? Will this scenario lead them to agree to a gross settlement sum that is inadequate compared to the strength of the case advanced on behalf of the class?

To date, we do not have the answers to the questions posed above as all of the 16 Part 4A cases in which GCOs have been granted are still in progress. It will be fascinating to see the judicial response to the scenario encapsulated by the last question posed above, concerning inadequate settlement sums. Over the last 32 years or so, Australian trial judges have almost invariably “accepted” the gross settlement sums agreed upon by the parties to the class action and have instead rejected, on a number of occasions, the total amounts claimed for legal costs, including settlement administration costs and, since Money Max, the funding commissions.

The new challenges posed by this regime, adverted to above, will no doubt prompt Victorian judges to scrutinise very closely whether proposed gross settlement sums are unreasonably low. But are the conflicts of interest concerns alluded to above legitimate? As correctly noted by Nichols J, “informed commentators” have posited, instead, that percentage-based remuneration results in “the alignment of the interests of solicitors and clients”. Perhaps, after a few more years of seeing the GCO regime in action, it might be possible to determine which line of reasoning provides the most accurate description of how contingency fees affect the conduct of plaintiff solicitors.

It will also be fascinating to see how many class representatives will seek to convince the court, at the settlement approval stage, that the rate specified in the GCO should be increased due to difficulties, faced during the course of the litigation, that could not have been reasonably foreseen at the time the GCO was granted. It will be recalled that s 33ZDA(3) expressly

---

40 Allen v G8 Education Ltd [2022] VSC 32, [74] (per Nichols J) (“very little legal work done”).
43 Allen v G8 Education Ltd [2022] VSC 32, [40] (per Nichols J).
44 Given that settlement is the most common way in which Australian class actions are ultimately resolved, in the rest of this chapter, I refer only to settlement proceeds.
45 Such a strategy would erode “the certainty of returns said to be an important foundation for the application” for a GCO: Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201, [33] (per John Dixon J).
Empowers trial judges to amend any aspects of the GCO, including the GCO rate. As explained by Stynes J,

[the existence of this power is significant. A review under that subsection, of a percentage fixed at an earlier time, will facilitate the Court ensuring that the percentage to which the law practice is ultimately entitled remains appropriate. The time at which a Court might amend an order and the basis for doing so are not constrained by the statute, but an obvious use of the provision would be the adjustment specified in an order, at the time of the settlement of the proceeding, having regards to the recovery achieved by the plaintiff, among other relevant considerations.]

Even if the Court accepts that the litigation was riskier and more complex than what could have been anticipated when the original GCO was granted, should it nevertheless reject the application for a higher rate if the GCO was made in a carriage motion context and granting the application would mean allowing the firm in question to receive a rate similar to, or indeed higher than, the rates that had been proposed by the firms defeated at the carriage motion; particularly if the defeat was attributable (to a significant extent) to the higher GCO rates?

The possibility of the lead plaintiffs seeking an increase in the GCO rate at the settlement stage may be drastically curtailed if, at the time of making the GCO, an undertaking is proffered by them not to make such a request; something which has actually been provided in several cases. Nichols J has explained that the judicial acceptance of such undertakings:

ensures against the prospect that the plaintiff (advised by his solicitors) might in the future seek to vary the GCO rate upwards in the future, thereby eroding the certainty of returns said to be an important foundation for the application made under s 33ZDA(1).

In minimising the prospect of a later application by the plaintiff to increase the GCO rate, the proffering of such an undertaking might also be understood as serving to narrow the issues potentially in dispute in the proceeding, thereby serving the Overarching Purpose.

Of course, the power vested on trial judges to vary the GCO rate may also allow them to decrease this rate if, once they are advised of the proposed gross settlement sum, they conclude, for instance, that the original GCO rate would “deliver a disproportionate return to the
solicitors”. The ratchet or sliding scale methodology adopted in GCO no. 7 and GCO no. 15 (in Table 3) seeks to avoid, or indeed anticipate, this problem by applying lower rates as the monetary compensation secured increases. Nichols J has revealed that

the purpose of a ratchet mechanism is to “avoid unnecessary costs in the event of a higher settlement or award”. That is, a ratchet or sliding scale mechanism might be employed to avoid a disproportionate (or otherwise unreasonable) cost impost on group members (and its corollary, an unreasonable or disproportionate return to the law firm). This is an important objective.54

53 Allen v G8 Education Ltd [2022] VSC 32, [93(b)] (per Nichols J). See also Gehrke v Noumi Ltd [2022] VSC 672, [54] (per Nichols J).
54 Nelson v Beach Energy [2022] VSC 424, [106] (per Nichols J). See also Lieberman v Crown Resorts Limited [2022] VSC 787, [58] (per Stynes J) (“[this mechanism] makes it plain that the [plaintiff law firm] accepted that, at certain junctures, it will be appropriate to step down the rate of legal costs it is entitled to recover”).
CHAPTER 2

FUNDING COMMISSIONS IN POST-MONEY MAX AND POST-GCO SETTLEMENT APPROVALS

As explained in the April 2023 report, I provide data with respect to funding commissions that were judicially-approved after Money Max because it was only after this ground-breaking ruling that trial judges started to review funding commissions.

A. POST-MONEY MAX FUNDING COMMISSIONS

- Number of funding commissions = 66.
- Range of funding commissions = 0% - 42.8%.
- Median commission = 24%.
- Most common commission = 25% (10 times - 15.1%).
- Commissions equal to 40% or above = 1 (1.5%).
- Commissions between 35% and 39.99% = 1 (1.5%).
- Commissions between 30% and 34.99% = 6 (9%).
- Commissions between 25% and 29.99% = 23 (34.8%).
- Commissions between 20% and 24.99% = 14 (21.2%).
- Commissions between 15% and 19.99% = 5 (7.5%).
- Commissions between 10% and 14.99% = 9 (13.6%).
- Commissions between 0% and 9.99% = 7 (10.6%).

B. PRE-GCO FUNDING COMMISSIONS

- Number of funding commissions = 33.
- Range of funding commissions = 8.3% - 42.8%.
- Median commission = 24.9%.
- Most common commission = 25% (5 times - 15.1%).
- Commissions equal to 40% or above = 1 (3%).
- Commissions between 35% and 39.99% = 0 (0%).
- Commissions between 30% and 34.99% = 4 (12.1%).
- Commissions between 25% and 29.99% = 11 (33.3%).
- Commissions between 20% and 24.99% = 9 (27.2%).
- Commissions between 15% and 19.99% = 2 (6%).
- Commissions between 10% and 14.99% = 2 (6%).
- Commissions between 0% and 9.99% = 5 (15.1%).

C. POST-GCO FUNDING COMMISSIONS

---

55 This is the period commencing on 27 October 2016 (the day after the common fund judgment was released in Money Max) and ending on 31 December 2023.

56 This is the period commencing on 27 October 2016 (the day after the common fund judgment was released in Money Max) and ending on 30 June 2020 (the day before the GCO regime came into operation.)
➢ Number of funding commissions = 33.
➢ Range of funding commissions = 0% - 35%.
➢ **Median commission = 22.7%**.
➢ **Most common commission = 0%** (6 times - 18.1%).
➢ Commissions between 35% and 39.99% = 1 (3%).
➢ Commissions between 30% and 34.99% = 2 (6%).
➢ Commissions between 25% and 29.99% = 12 (36.3%).
➢ Commissions between 20% and 24.99% = 5 (15.1%).
➢ Commissions between 15% and 19.99% = 3 (9%).
➢ Commissions between 10% and 14.99% = 4 (12.1%).
➢ Commissions between 0% and 9.99% = 6 (18.1%).

D. **POST-MONEY MAX COMMON FUND ORDERS**

➢ Number of funding commissions = 26.
➢ Range of funding commissions = 8.3% - 30%.
➢ **Median commission = 25%**.
➢ **Most common commission = 25%** (6 times - 23%).
➢ Commissions between 30% and 34.99% = 2 (7.6%).
➢ Commissions between 25% and 29.99% = 12 (46.1%).
➢ Commissions between 20% and 24.99% = 6 (23%).
➢ Commissions between 15% and 19.99% = 3 (11.5%).
➢ Commissions between 10% and 14.99% = 2 (7.6%).
➢ Commissions between 0% and 9.99% = 1 (3.8%).

E. **POST-GCO COMMON FUND ORDERS**

➢ Number of funding commissions = 13.
➢ Range of funding commissions = 10.9% - 30%.
➢ **Median commission = 25%**.
➢ **Most common commission = 25%** (4 times - 30.7%).
➢ Commissions between 30% and 34.99% = 1 (7.6%).
➢ Commissions between 25% and 29.99% = 8 (61.5%).
➢ Commissions between 20% and 24.99% = 1 (7.6%).
➢ Commissions between 15% and 19.99% = 2 (15.3%).
➢ Commissions between 10% and 14.99% = 1 (7.6%).
➢ Commissions between 0% and 9.99% = 0 (0%).

F. **POST-MONEY MAX FUNDING COMMISSIONS BY CATEGORIES OF CLAIMS**

**SHAREHOLDER**

➢ Number of settlements = 30.
➢ Range of funding commissions = 0% - 33.1%.
➢ **Median funding commission = 22.6%**.
CONSUMER PROTECTION

➢ Number of settlements = 11.
➢ Range of funding commissions = 0% - 29.1%.
➢ Median funding commission = 20%.

INVESTOR

➢ Number of settlements = 11.
➢ Range of funding commissions = 0% - 42.8%.
➢ Median funding commission = 25.4%.

MASS TORT

➢ Number of settlements = 5.
➢ Range of funding commissions = 25% - 30%.
➢ Median funding commission = 25%.

EMPLOYMENT

➢ Number of settlements = 3.
➢ Range of funding commissions = 18.6% - 35%.
➢ Median funding commission = 25%.

RACIAL DISCRIMINATION

➢ Number of settlements = 2.
➢ Range of funding commissions = 10.9% - 20%.
➢ Median funding commission = 15.4%.

A. POST-GCO FUNDING COMMISSIONS BY CATEGORIES OF CLAIMS

SHAREHOLDER

➢ Number of settlements = 13.
➢ Range of funding commissions = 0% - 30%.
➢ Median funding commission = 21.8%.

CONSUMER PROTECTION

➢ Number of settlements = 7.
➢ Range of funding commissions = 0% - 29.1%.
➢ Median funding commission = 25%.

EMPLOYMENT

➢ Number of settlements = 3.
➢ Range of funding commissions = 18.6% - 35%.
➢ Median funding commission = 25%.

INVESTOR

➢ Number of settlements = 2.
➢ Range of funding commissions = 0% - 27.7%.
➢ Median funding commission = 13.8%.

MASS TORT

➢ Number of settlements = 2.
➢ Range of funding commissions = 25% - 30%.
➢ Median funding commission = 27.5%.
## TABLE 4: POST-MONEY MAX AND POST-GCO SETTLEMENTS IN FUNDED CLASS ACTIONS AS AT 31 DECEMBER 2023

<table>
<thead>
<tr>
<th>SETTLED CLASS ACTIONS</th>
<th>GROSS SETTLEMENT SUMS&lt;sup&gt;57&lt;/sup&gt;</th>
<th>COURT; WHETHER A COMMON FUND ORDER (“CFO”)&lt;sup&gt;58&lt;/sup&gt; WAS MADE; TYPE OF CLAIM</th>
<th>FUNDING COMMISSIONS&lt;sup&gt;59&lt;/sup&gt; IN DOLLARS AND AS PERCENTAGES OF THE GROSS SETTLEMENT SUMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. NSD1609/2013 Blairgowrie Trading Ltd v Allco Finance Group Ltd</td>
<td>$40m</td>
<td>Federal Court CFO Shareholder</td>
<td>$8,850,000 (22.1%)</td>
</tr>
<tr>
<td>2. NSD529/2014 HFPS Pty Ltd v Tamaya Resources Ltd</td>
<td>$6.75m</td>
<td>Federal Court Shareholder</td>
<td>$725,091 (10.7%)</td>
</tr>
<tr>
<td>3. NSD273/2016 Phillips v Reckitt Benckiser</td>
<td>$3.5m&lt;sup&gt;60&lt;/sup&gt; plus $1.5m&lt;sup&gt;61&lt;/sup&gt; plus $515,419&lt;sup&gt;62&lt;/sup&gt; = $5,515,419</td>
<td>Federal Court CFO Consumer protection</td>
<td>Less than $700,000&lt;sup&gt;63&lt;/sup&gt; (less than 12.6%)</td>
</tr>
</tbody>
</table>

<sup>57</sup> Gross settlement sum is defined as the total payments made by defendants/respondents, with respect to class action settlements, including payments earmarked to reimburse the funder or the lead plaintiff’s solicitors for legal costs and disbursements and After-the-Event insurance premiums; even where the reimbursement for one or more of these three categories of expenses (a) was agreed upon only after the judicial approval of the settlement agreement; and (b) whether or not the parties treated these payments as a component of the gross settlement sum; and (c) whether or not they were approved by the Court.

<sup>58</sup> The term Common Fund Orders encompasses the orders made under other names, in the months following Brewster, but which were indistinguishable from Common Fund Orders. See also Evans v Davantage Group Pty Ltd (No 3) [2021] FCA 70, [49] (per Beach J).

<sup>59</sup> Payments made to funders to reimburse them for any of the expenses they incurred in funding the litigation (including the After-the-Event insurance), do not constitute funding commissions. Reimbursement payments have nothing to do with the simple “reward for risk” philosophy that underpins the concept of funding commissions. Similarly, the issue of whether funders should be reimbursed from settlement proceeds, for any After-the-Event insurance premiums they have paid, provides no basis for expanding the concept of funding commissions to encompass the concept of reimbursement payments.

<sup>60</sup> Sum earmarked for class members.

<sup>61</sup> Sum paid separately by the respondents for legal costs, according to the Law Council of Australia’s settlement data, as up-dated and revised by Ben Slade in March 2023: see [https://www.lawcouncil.asn.au/federal-litigation-dispute-resolution/our-committees/class-actions-committee](https://www.lawcouncil.asn.au/federal-litigation-dispute-resolution/our-committees/class-actions-committee). Slade is one of the country’s most successful class action lawyers.

<sup>62</sup> Sum paid separately by the respondents for After-the-Event insurance.

<sup>63</sup> 20% out of the proceeds payable to class members minus settlement administration costs. Unfortunately, the sum for these administration costs was not revealed in the settlement approval judgment or related orders.
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Amount</th>
<th>Court</th>
<th>Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. NSD660/2014 Jones v Treasury Wines Estates Ltd</td>
<td>$49m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$11,650,000 (23.7%)</td>
</tr>
<tr>
<td>5. NSD1558/2012 Caason Investments Pty Ltd v Cao</td>
<td>$19.25m</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$5,775,000 (30%)</td>
</tr>
<tr>
<td>6. VID1213/2016 Hall v Slater &amp; Gordon Limited</td>
<td>$36.5m</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$8m (21.9%)</td>
</tr>
<tr>
<td>7. QUD591/2015 Clarke v Sandhurst Trustees Ltd</td>
<td>$16.85m</td>
<td>Federal Court</td>
<td>Investor</td>
<td>$5,055,000 (30%)</td>
</tr>
<tr>
<td>8. NSD1684/2016 Santa Trade Concerns Pty Ltd v Robinson</td>
<td>$3m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$500,000 (16.6%)</td>
</tr>
<tr>
<td>9. VID513/2015 Money Max International Pty Ltd v QBE Insurance Group Ltd</td>
<td>$132.5m</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$30.75m (23.2%)</td>
</tr>
<tr>
<td>10. NSD362/2016 Petersen Superannuation Fund Pty Ltd v Bank of Queensland</td>
<td>$12m</td>
<td>Federal Court</td>
<td>CFO Investor</td>
<td>$1m (8.3%)</td>
</tr>
<tr>
<td>11. NSD1018/2014 Liverpool City Council v McGraw-Hill Financial Inc</td>
<td>$215m</td>
<td>Federal Court</td>
<td>Investor</td>
<td>$92,031,922.99 (42.8%)</td>
</tr>
</tbody>
</table>

64 Figure provided by Maurice Blackburn, on 19 August 2020, to the Parliamentary Joint Committee on Corporate and Financial Services in its response to a question on notice.

Electronic copy available at: https://ssrn.com/abstract=4699815
<table>
<thead>
<tr>
<th></th>
<th>Case Reference</th>
<th>Settlement Amount</th>
<th>Court</th>
<th>Plaintiff Type</th>
<th>Plaintiff Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.</td>
<td>NSD453/2014 Hodges v Sandhurst Trustees Ltd</td>
<td>$28,158,500</td>
<td>Federal Court</td>
<td>Investor</td>
<td>$8,447,550 (30%)</td>
</tr>
<tr>
<td>13.</td>
<td>NSD1488/2017 Smith v Sandhurst Trustees Ltd</td>
<td>$11m</td>
<td>Federal Court</td>
<td>CFO Investor</td>
<td>$2,750,000 (25%)</td>
</tr>
<tr>
<td>14.</td>
<td>NSD1346/2015 Hopkins v Macmahon Holdings Ltd</td>
<td>$6.7m</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$1,295,000 (19.3%)</td>
</tr>
<tr>
<td>15.</td>
<td>2015/171592 Smith v Australian Executor Trustee</td>
<td>$15,750,000</td>
<td>Supreme Court of NSW</td>
<td>Investor</td>
<td>$4,252,500 (27%)</td>
</tr>
<tr>
<td>16.</td>
<td>VID1375/2017 Kuterba v Sirtex Medical Ltd</td>
<td>$40m</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$10,214,529.60 (25.5%)</td>
</tr>
<tr>
<td>17.</td>
<td>NSD2074/2016 Bradgate v Ashley Services Group Ltd</td>
<td>$14.6m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$4,844,158.67 (33.1%)</td>
</tr>
<tr>
<td>18.</td>
<td>SAD307/2014 Perazzoli v Bank of SA</td>
<td>$13.25m</td>
<td>Federal Court</td>
<td>Investor</td>
<td>$3,300,000 (24.9%)</td>
</tr>
<tr>
<td>19.</td>
<td>VID811/2010 Andrews v ANZ Banking Group Ltd</td>
<td>$4,464,000(^{65})</td>
<td>Federal Court</td>
<td>Consumer protection</td>
<td>$500,000 (11%)</td>
</tr>
<tr>
<td>20.</td>
<td>NSD1382/2014 Rushleigh Services Pty Ltd</td>
<td>$16.5m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$3.95m (23.9%)</td>
</tr>
</tbody>
</table>

\(^{65}\) This figure was arrived at by adding to the settlement proceeds of $763,901, the legal costs paid separately by the respondents. According to the Law Council of Australia’s settlement data, as up-dated and revised by Ben Slade, this latter figure is $3.7m.
<table>
<thead>
<tr>
<th>Case No.</th>
<th>Parties</th>
<th>Issue(s)</th>
<th>Amount</th>
<th>Court</th>
<th>Role</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>21. VID1390/2017</td>
<td>Clime Capital Ltd v UGL Pty Ltd</td>
<td>Shareholder</td>
<td>$18m</td>
<td>Federal Court</td>
<td>$4,050,000 (22.5%)</td>
<td></td>
</tr>
<tr>
<td>22. QUD714/2016</td>
<td>Pearson v Queensland</td>
<td>Racial discrimination</td>
<td>$190m</td>
<td>Federal Court</td>
<td>$38m (20%)</td>
<td></td>
</tr>
<tr>
<td>23. VID1010/2018</td>
<td>Endeavour River Pty Ltd v MG Responsible Entity Ltd</td>
<td></td>
<td>$42m</td>
<td>Federal Court</td>
<td>$10,700,865 (25.4%)</td>
<td></td>
</tr>
<tr>
<td>24. VID163/2017</td>
<td>McKay Super Solutions Pty Ltd v Bellamy’s Australia Ltd</td>
<td>Investor</td>
<td>$30m</td>
<td>Federal Court</td>
<td>$8,697,000 (28.9%)</td>
<td></td>
</tr>
<tr>
<td>25. VID213/2017</td>
<td>Basil v Bellamy’s Australia Ltd</td>
<td>Shareholder</td>
<td>$19.7m</td>
<td>Federal Court</td>
<td>$5,711,030 (28.9%)</td>
<td></td>
</tr>
<tr>
<td>26. VID508/2017</td>
<td>Webster v Murray-Goulburn Co-Operative Co Ltd</td>
<td>Investor</td>
<td>$37.5m</td>
<td>Federal Court</td>
<td>$8,625,000 (23%)</td>
<td></td>
</tr>
<tr>
<td>27. ACD93/2016</td>
<td>Inabu Pty Ltd v CIMIC Group Ltd</td>
<td>Shareholder</td>
<td>$32.4m</td>
<td>Federal Court</td>
<td>$8.6m66 (26.5%)</td>
<td></td>
</tr>
<tr>
<td>28. VID419/2019</td>
<td>Fisher v Vocus Group</td>
<td>Shareholder</td>
<td>$35m</td>
<td>Federal Court</td>
<td>$3,897,735.37 (11.1%)</td>
<td></td>
</tr>
<tr>
<td>29. VID1093/2018</td>
<td>Uren v RMBL Investments Ltd</td>
<td>Consumer Protection</td>
<td>$3m</td>
<td>Federal Court</td>
<td>$750,000 (25%)</td>
<td></td>
</tr>
</tbody>
</table>

66 This is the figure mentioned in the Court-approved settlement notice distributed to class members.
### INTRODUCTION OF GROUP COSTS ORDERS IN VICTORIAN CLASS ACTIONS

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Description</th>
<th>Court</th>
<th>Shareholder</th>
<th>Additional Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>34. NSD1555/2018</td>
<td>El-Zein v Barton Nine Pty Ltd</td>
<td>$2,571,492</td>
<td>Federal Court Tax-related</td>
<td>$655,171.16 (25.4%)</td>
</tr>
<tr>
<td>35. VID561/2017</td>
<td>Court v Spotless Limited</td>
<td>$95m</td>
<td>Federal Court CFO Shareholder</td>
<td>$19,500,324 (20.5%)</td>
</tr>
<tr>
<td>36. NSD1364/2015</td>
<td>Kenquist Nominees Pty Ltd v Campbell</td>
<td>$7m</td>
<td>Federal Court Shareholder</td>
<td>$0 (0%)</td>
</tr>
<tr>
<td>37. NSD544/2019</td>
<td>Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd</td>
<td>$138m</td>
<td>Federal Court CFO Consumer protection</td>
<td>$34,500,000 (25%)</td>
</tr>
<tr>
<td>38. NSD1857/2016</td>
<td>Bywater v Appco Group Australia Pty Ltd</td>
<td>$2.05m</td>
<td>Federal Court Employment</td>
<td>$512,500 (25%)</td>
</tr>
</tbody>
</table>

---

67 This is the “mean” figure mentioned in the settlement approval judgment: *TW McConnell Pty Ltd v SurfStitch Group Ltd (administrator appointed) (No 4)* [2021] NSWSC 121, [37] (per Stevenson J).
| No. | VID | Plaintiff v Defendant | Court | Plaintiff’s Solicitor | Amount | Description | Judgment
|-----|-----|-----------------------|-------|----------------------|--------|-------------|--------
| 39. | 982/2018 | Evans v Davantage Group Pty Ltd | Federal Court | CFO | $9.5m | Consumer protection | $2,733,266.13 (28.7%) |
| 40. | 2017/294069 | Findlay v DSHE Holdings Ltd (and another class action) | Supreme Court of NSW | Shareholder | $25m | $0 (0%) |
| 41. | 758/2019 | Wetdal Pty Ltd v Estia Health Ltd | Federal Court | Shareholder | $38.4m | $8,748,602 (22.7%) |
| 42. | 434/2015 | Whittenbury v Vocation Ltd | Federal Court | Shareholder | $50m | $10,919,348.10 (21.8%) |
| 43. | 1812/2017 | Lenthall v Westpac Banking Corporation | Federal Court | Consumer protection | $30m | $0 (0%) |
| 44. | 1010/2019 | Hall v Arnold Bloch Leibler | Federal Court | CFO | $28m | $7,840,000 (28%) |
| 45. | 1317/2017 | Zantran Pty Ltd v Crown Resorts Ltd | Federal Court | Shareholder | $125m | $30,200,688.80 (24.1%) |
| 46. | 2017/00340824 | Haselhurst v Toyota Motor Corporation (and 5 other class actions) | Supreme Court of NSW | CFO | $52m | $13m (25%) |
| 47. | 2162/2018 | Jack v CoreStaff NT Pty Ltd | Federal Court | Employment | $6.4m | $2,240,000 (35%) |
| 48. | | | Federal Court | | $33m | $8,250,000 |

68 See Wetdal as Trustee for the BlueCo Two Superannuation Fund v Estia Health Ltd [2021] FCA 475, [20]-[21], [25] and [104] (per Beach J).

Electronic copy available at: https://ssrn.com/abstract=4699815
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Defendant or Other Parties</th>
<th>Amount</th>
<th>Court</th>
<th>Plaintiff Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>49. VID1131/2018 Wills v Woolworths Group Ltd</td>
<td>$44.5m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$4,730,000 (10.6%)</td>
<td></td>
</tr>
<tr>
<td>50. VID918/2018 Hall v Pitcher Partners</td>
<td>$41m</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$11,480,000 (28%)</td>
<td></td>
</tr>
<tr>
<td>51. VID488/2020 Bradshaw v BSA Limited</td>
<td>$20m</td>
<td>Federal Court</td>
<td>CFO Employment</td>
<td>$3,732,000 (18.6%)</td>
<td></td>
</tr>
<tr>
<td>52. NSD220/2019 Carpenders Park Pty Ltd v SIMS Metal Management Ltd</td>
<td>$29.5m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$5,440,577.67 (18.4%)</td>
<td></td>
</tr>
<tr>
<td>53. 2019/00232749 Williamson v Sydney Olympic Park Authority</td>
<td>$50m&lt;sup&gt;69&lt;/sup&gt;</td>
<td>Supreme Court of NSW</td>
<td>Real estate</td>
<td>$7,358,107&lt;sup&gt;70&lt;/sup&gt; (14.7%)</td>
<td></td>
</tr>
<tr>
<td>54. NSD580/2018 Webb v GetSwift Ltd</td>
<td>$1m</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$0 (0%)</td>
<td></td>
</tr>
<tr>
<td>55. VID182/2018 Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (and another class action)</td>
<td>$98m</td>
<td>Federal Court</td>
<td>Franchise</td>
<td>$12,005,000 (12.25%)</td>
<td></td>
</tr>
<tr>
<td>56. NSD1245/2016 Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd</td>
<td>$192,500,000</td>
<td>Federal Court</td>
<td>Mass tort</td>
<td>$57,750,000 (30%)</td>
<td></td>
</tr>
</tbody>
</table>

<sup>69</sup> Estimate arrived at by doing some calculations, using figures mentioned in the settlement approval judgment: see Williamson v Sydney Olympic Park Authority [2022] NSWSC 1618, [42], [70] and [87] (per Black J).

<sup>70</sup> Ibid.
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Plaintiff Against</th>
<th>Court</th>
<th>Cause of Action</th>
<th>Amount</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>57. 2021/00117924</td>
<td>Ellis v Commonwealth</td>
<td>Supreme Court of NSW</td>
<td>CFO Racial discrimination</td>
<td>$50,450,000</td>
<td>5.5m (10.9%)</td>
</tr>
<tr>
<td>58. NSD939/2020</td>
<td>J &amp; J Richards Super Pty Ltd v Linchpin Capital Group Limited</td>
<td>Federal Court</td>
<td>Investor</td>
<td>$6,290,000</td>
<td>$0 (0%)</td>
</tr>
<tr>
<td>59. NSD1100/2021</td>
<td>Spozac Pty Ltd v Tyro Payments Ltd</td>
<td>Federal Court</td>
<td>Consumer protection</td>
<td>$5m</td>
<td>$1m (20%)</td>
</tr>
<tr>
<td>60. 2014/223271</td>
<td>Moore v Scenic Tours Ltd</td>
<td>Supreme Court of NSW</td>
<td>Consumer protection</td>
<td>$26m</td>
<td>$7,590,000 (29.1%)</td>
</tr>
<tr>
<td>61. NSD431/2020</td>
<td>Haswell v Commonwealth</td>
<td>Federal Court</td>
<td>CFO Mass tort</td>
<td>$132,700,000</td>
<td>$33,175,000 (25%)</td>
</tr>
<tr>
<td>62. S ECI 2020/02588</td>
<td>Iddles v Fonterra Australia Pty Ltd</td>
<td>Supreme Court of Victoria</td>
<td>CFO Investor</td>
<td>$25m</td>
<td>$6,880,000 (27.7%)</td>
</tr>
<tr>
<td>63. VID632/2017</td>
<td>Sadie Ville Pty Ltd v Deloitte Touche</td>
<td>Federal Court</td>
<td>Shareholder</td>
<td>$18.5m</td>
<td>$5,130,000 (27.7%)</td>
</tr>
<tr>
<td>64. QUD182/2020</td>
<td>Ingram v Ardent Leisure Ltd</td>
<td>Federal Court</td>
<td>CFO Shareholder</td>
<td>$26m</td>
<td>$7,800,000 (30%)</td>
</tr>
<tr>
<td>65. VID962/2019</td>
<td>Ghee v BT Funds Management Limited</td>
<td>Federal Court</td>
<td>Consumer protection</td>
<td>$29,950,000</td>
<td>$5,708,500 (19%)</td>
</tr>
<tr>
<td>66. VID996/2017</td>
<td>Luke v Aveo Group Ltd</td>
<td>Federal Court</td>
<td>Consumer protection</td>
<td>$11m</td>
<td>$0 (0%)</td>
</tr>
</tbody>
</table>
CHAPTER 3

BIGGEST CLASS ACTION SETTLEMENTS

In light of the increasing number of large class action settlements, I have decided to provide an up-dated list of class action settlements which produced gross settlement sums of $50m or more. In bold are funded class actions. In italics I have also added those settlements (three) that have not yet been evaluated by trial judges.

Settled Australian class actions involving payments by defendants/respondents equal to at least $50 million

1. $494,666,667 (2014 - Supreme Court of Victoria);[71]
2. $440m (2021 - Supreme Court of NSW);[72]
3. $300m (2023 - Federal Court of Australia);[73]
4. $300m (2015 - Supreme Court of Victoria);[74]
5. $250m (2016 - Federal Court of Australia);[75]
6. $222m (2020 - Federal Court of Australia);[76]
7. $215m (2018 - Federal Court of Australia);[77]
8. $192.5m (2023 - Federal Court of Australia);[78]
9. $190m (2018 - Federal Court of Australia);[79]
10. $180.4m (2024 - Federal Court of Australia);[80]
11. $150m (2012 - Federal Court of Australia);[81]
12. $144.5m (2009 - Federal Court of Australia);[82]
13. $138m (2020 - Federal Court of Australia);[83]
14. $132.7m (2023 - Federal Court of Australia);[84]
15. $132.5m (2018 - Federal Court of Australia);[85]
16. $125m (2022 - Federal Court of Australia);[86]
17. $121m (2016 - Federal Court of Australia);[87]
18. $120m (2011 - Federal Court of Australia);[88]

[72] 2011 Queensland floods class action.
[73] Pelvic mesh class actions against Johnson & Johnson and unit Ethicon.
[75] DePuy ASR hip implants class action.
[76] Diesel-gate product liability class actions. The majority of the class members were represented in three unfunded class actions. There were also two funded class actions.
[77] Class actions brought with respect to Standard & Poor’s ratings of collateralised debt obligations (“CDOs”).
[78] Montara oil spill class action.
[79] Stolen wages class action against the State of Queensland.
[80] Stolen wages class action against the State of Western Australia.
[81] Three Centro group shareholder class actions.
[82] Aristocrat Leisure Ltd shareholder class action.
[83] Junk insurance class action against Swann Insurance.
[84] Toxic foam class action against the Commonwealth of Australia.
[85] QBE Insurance Group Ltd shareholder class action.
[86] Crown Resorts Ltd shareholder class action.
[87] RiverCity class action filed on behalf of investors in Brisbane’s Clem7 road tunnel.
[88] Cardboard boxes cartel class action.
19. $115m (2012 - Supreme Court of Victoria);\textsuperscript{89}
20. $112m (2003 - Federal Court of Australia);\textsuperscript{90}
21. $112m (2021 - Supreme Court of Victoria);\textsuperscript{91}
22. $110m (2023 – Supreme Court of NSW);\textsuperscript{92}
23. $110m (2010 - Federal Court of Australia);\textsuperscript{93}
24. $109.9m (2016 - Federal Court of Australia);\textsuperscript{94}
25. $105m (2023 - Federal Court of Australia);\textsuperscript{95}
26. $100m (2024 - Federal Court of Australia);\textsuperscript{96}
27. $100m (2024 - Federal Court of Australia);\textsuperscript{97}
28. $98m (2022 - Federal Court of Australia);\textsuperscript{98}
29. $95.5m (2013 - Supreme Court of Victoria);\textsuperscript{99}
30. $95m (2020 - Federal Court of Australia)\textsuperscript{100}
31. $92.5m (2020 - Federal Court of Australia);\textsuperscript{101}
32. $90m (2018 - Supreme Court of Victoria);\textsuperscript{102}
33. $86m (2020 - Federal Court of Australia);\textsuperscript{103}
34. $82.5m (2013 - Federal Court of Australia);\textsuperscript{104}
35. $75m (2014 - Federal Court of Australia);\textsuperscript{105}
36. $69.4m (2014 - Federal Court of Australia);\textsuperscript{106}
37. $69.2m (2017 & 2019 - Supreme Court of Victoria);\textsuperscript{107}
38. $67.5m (2011 - Federal Court of Australia);\textsuperscript{108}
39. $67.4m (2020 - Federal Court of Australia);\textsuperscript{109}
40. $57.5m (2012 - Federal Court of Australia);\textsuperscript{110}
41. $56.3m (2022 - Federal Court of Australia);\textsuperscript{111}
42. $52m (2022 - Supreme Court of NSW);\textsuperscript{112}
43. $50.45m (2023 - Supreme Court of NSW);\textsuperscript{113}
44. $50m (2023 - Federal Court of Australia);\textsuperscript{114}

\textsuperscript{89} National Australia Bank Ltd shareholder class action with respect to CDOs.
\textsuperscript{90} GIO Australia Holdings Ltd shareholder class action.
\textsuperscript{91} Robodebt class action.
\textsuperscript{92} Shareholder class action against AMP over its fees-for-no-service conduct.
\textsuperscript{93} Multiplex Limited shareholder class actions.
\textsuperscript{94} Unlawful discrimination class action brought on behalf of workers with intellectual disabilities who work in Australian Disability Enterprises.
\textsuperscript{95} Pelvic mesh class action against Boston Scientific.
\textsuperscript{96} Class action against AMP with respect to its buyer of last report policies.
\textsuperscript{97} Class action against Colonial First State with respect to its excessive fees on superannuation accounts.
\textsuperscript{98} 7-Eleven franchise class actions.
\textsuperscript{99} Thalidomide (morning sickness pills) class actions.
\textsuperscript{100} Spotless Ltd shareholder class action.
\textsuperscript{101} Toxic foam class action against the Commonwealth of Australia.
\textsuperscript{102} Manus Island asylum seekers class action.
\textsuperscript{103} Commonwealth of Australia toxic foam class action.
\textsuperscript{104} Storm Financial investor class action.
\textsuperscript{105} Modtech Engineering Ltd shareholder class action.
\textsuperscript{106} Leighton Holdings Ltd shareholder class action.
\textsuperscript{107} Banksia investor class action.
\textsuperscript{108} Commonwealth of Australia misfeasance in public office class action.
\textsuperscript{109} Cash Converters “pay-day” loans class action.
\textsuperscript{110} Sigma Pharmaceuticals Ltd shareholder class action.
\textsuperscript{111} Colonial Superannuation fees class action.
\textsuperscript{112} Airbags class actions.
\textsuperscript{113} Stolen generation class action against the Northern Territory.
\textsuperscript{114} Class action against the Commonwealth Bank with respect to worthless consumer credit insurance.
45. $50m (2022 - Supreme Court of NSW);\(^\text{115}\)
46. $50m (2021 - Federal Court of Australia);\(^\text{116}\) and
47. $50m (2012 - Federal Court of Australia).\(^\text{117}\)

Since the April 2023 report, this list has increased by six.\(^\text{118}\) Four of these new settlements were reached in funded class actions thus increasing the percentage of funded class actions, that have been settled for a gross settlement sum of at least $50m, to 63.8%. But the dominance of unfunded class actions in relation to the top six settlements (with five out of six - 83.3%) remains unaltered. The leadership of Federal class actions, in this category, also continues with 35 out of 47 (74.4%) settlements.

\(^{115}\) Opal Towers class action.
\(^{116}\) Vocation Ltd shareholder class action.
\(^{117}\) Two Centro group shareholder class actions.
\(^{118}\) Settlements no. 10, 14, 22, 26, 27 and 44.